

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2056

Cir. Ct. No. 2005CF50

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN M. KLATT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Oconto County:
MICHAEL T. JUDGE, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Stephen Klatt, pro se, appeals an order denying his petition for writ of habeas corpus. He argues the circuit court breached his plea agreement and his counsel was ineffective for failing to object to the court's breach. We affirm.

BACKGROUND

¶2 In 2005, the State charged Klatt with repeated sexual assault of a child and incest. Pursuant to an agreement with the State, Klatt entered an *Alford*¹ plea to the repeated sexual assault of a child charge. In exchange for Klatt's plea, the State moved to dismiss outright the incest charge and the parties jointly recommended a withheld sentence in favor of six years' probation with one year jail as a condition of probation. The circuit court, however, declined to follow the parties' recommendation and sentenced Klatt to ten years' initial confinement and five years' extended supervision.

¶3 Klatt had a no-merit appeal. See *State v. Klatt*, No. 2007AP849-CRNM, unpublished op. and order (WI App Dec. 27, 2007). We concluded there was no arguable basis to appeal Klatt's conviction. *Id.* at 1-2. We specifically noted the court advised Klatt at the time his plea was entered that the court was not bound by the plea agreement and the State had not breached the plea agreement. *Id.* at 3-4. Our supreme court denied Klatt's petition for review.

¶4 Klatt then filed a "motion for resentencing," arguing the court violated his due process rights when it sentenced him to more than the plea agreement recommended. The circuit court summarily denied that motion, and we affirmed. See *State v. Klatt*, No. 2011AP1896, unpublished op. (WI App July 31, 2012). We concluded Klatt's appeal was procedurally barred because he could have raised his argument in a response to his no-merit appeal, and, in any event,

¹ Referring to *North Carolina v. Alford*, 400 U.S. 25 (1970).

Klatt's argument was meritless because circuit courts are not bound by agreements reached between prosecutors and defendants. *Id.*, ¶¶5, 7.

¶5 Klatt then filed a petition for writ of habeas corpus. He argued his trial counsel rendered ineffective assistance for failing to object to the circuit court's breach of the plea agreement at sentencing. The circuit court denied Klatt's petition, noting Klatt had already made that argument. The court also emphasized that it had advised Klatt when he entered his plea that the court was not bound by any plea agreement and could sentence him up to the maximum term of imprisonment. Klatt appeals.

DISCUSSION

¶6 This court "independently review[s] the 'legal issues arising in the context of a petition for habeas corpus.'" *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶17, 290 Wis. 2d 352, 714 N.W.2d 900 (quoting *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶8, 262 Wis. 2d 720, 665 N.W.2d 155). Habeas corpus is an equitable remedy that protects a person's right to personal liberty by freeing him or her from illegal confinement. *State v. Pozo*, 2002 WI App 279, ¶8, 258 Wis. 2d 796, 654 N.W.2d 12. Because it provides extraordinary relief, it is available only where the petitioner demonstrates: (1) restraint of his or her liberty; (2) that was imposed contrary to constitutional protections or by a body lacking jurisdiction; and (3) no other adequate remedy available at law. *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶12, 252 Wis. 2d 133, 643 N.W.2d 771. "Unless these criteria are met, the writ of habeas corpus will not be available to a petitioner." *Id.*

¶7 WISCONSIN STAT. § 974.06(8)² sets out the statutory provisions that explain the availability, or lack thereof, of habeas corpus relief in postconviction proceedings. That statute provides:

A petition for a writ of habeas corpus ... shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

Additionally, in a postconviction setting, a petition for writ of habeas corpus will not be granted where

(1) the petitioner asserts a claim that he or she could have raised during a prior appeal, but failed to do so, and offers no valid reason to excuse such failure ... or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict

Pozo, 258 Wis. 2d 796, ¶9.

¶8 Here, Klatt argues he is entitled to habeas corpus relief because his counsel was ineffective for failing to object to the circuit court's breach of his plea agreement. Klatt, however, failed to make any showing in his brief-in-chief that demonstrated he met the criteria for habeas corpus relief. *See Haas*, 252 Wis. 2d 133, ¶12 (writ of habeas corpus will not be available unless petitioner demonstrates he or she meets criteria for relief). In his reply brief, Klatt offers arguments he claims demonstrate he is entitled to habeas corpus relief. However, we do not address arguments raised for the first time in a reply brief. *See State v. Mata*, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999).

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶9 Further, and more importantly, Klatt has already argued on appeal the circuit court breached his plea agreement. *See Pozo*, 258 Wis. 2d 796, ¶9 (habeas corpus relief unavailable if claim was previously litigated in prior appeal). It makes no difference that he now frames his argument under the guise of ineffective assistance of counsel. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”). Because Klatt has asserted a claim that was previously litigated, the circuit court properly denied his petition for writ of habeas corpus.

¶10 Finally, even if we again addressed Klatt’s argument on the merits, we would conclude his argument is meritless. A circuit court is not a party to the plea agreement and a circuit court is not required to follow the parties’ sentence recommendation. *See State v. Comstock*, 168 Wis. 2d 915, 927, 485 N.W.2d 354 (1992) (“Circuit courts in this state may not involve themselves in the plea agreement process and are not bound by any plea agreement between a prosecutor and a defendant.”). Moreover, we observe that, during the plea hearing, Klatt specifically advised the court that he understood the court was not bound by the parties’ agreement and, given the nature of the charge, the court could sentence him up to forty years’ imprisonment, fine him no more than \$100,000, or both. The circuit court properly refused to grant Klatt’s petition for writ of habeas corpus.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

